CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

IN THE MATTER OF DURGA CHARAN DAS *v.* SASHI BHUSAN GUHO AND OTHERS.* 1886 *August* 3

Criminal Procedure Code, s. 133—*Public way—Nuisance—Removal of obstruction—Jury—Majority of Jury.*

When a minority of a Jury appointed under the provisions of s. 133 of the Criminal Procedure Code do not act the Magistrate cannot proceed under that section upon a report submitted by the majority.

THIS was a reference by the Sessions Judge of Backergunge, the terms of which were as follows:—

"I have the honor to submit herewith the record of the proceedings of the Magistrate of the District under Chapter X, Criminal Procedure Code, on the petition of Durga Charan Das against Sashi Bhusan Guho and others, and to recommend that for the reasons subjoined the final order of the Magistrate be set aside and he be directed to proceed afresh *ab initio* according to law.

"It appears that on the 30th October 1885, Durga Charan Das of Runshi, a neighbour of the applicant for revision, presented a petition to the Magistrate, to the effect that the applicant for revision and nine others had closed a public path by means of a thorny hedge and plantain trees planted across the same.

"On the petition is endorsed the examination of the petitioner by the Magistrate: "The defendants have bunded my road in Soshipore, south of my 'bari'; they have cut it and planted on it suparis and plantains, and a new fence, and pulled down a '*char*' that was there. It is a frequented path leading to the Government road." The petitioner was required to adduce evidence in seven days. On the 9th November two witnesses were examined, and the same day the Magistrate ordered "Notice to defendants under s. 133 to clear the road or show cause on the 18th." On the 18th November, the applicant for revision Sashi Bhusan Guho entered appearance and showed cause by a counter-petition. The notice under s. 133 of the Criminal

* Criminal Reference No. 150 of 1886, made by J. F. Bradbury, Esq., Sessions Judge of Backergunge, dated the 23rd of July 1886.

1886

DURGA CHARAN DAS v. SASHI BHUSAN GUHO.

Procedure Code seems to have been directed to the applicant for revision alone, and required him to remove the hedge or fence and other obstructions, and to restore the path or road to its former condition before the 18th November, or show cause against Durga Charan Das's petition on that day, but neither it nor the petition refers expressly to the "char" or bamboo bridge over the trench or ditch which severed the path in two. The counter-petition of the applicant for revision denied that he had obstructed any public path or road, affirmed the falsity of the petitioner Durga Charan Das's allegations, and moved the Magistrate to appoint a jury to pronounce whether the order directed to him was reasonable and proper. The defence of the applicant for revision appears to have been throughout that what the petitioner termed a permanent public path or road was in reality a temporary private path or foot-way over the applicant's own land. The Magistrate thereupon appointed a jury, consisting of the Sub-Registrar of Backergunge foreman, Rajmohon Chakrabarti and Ramcoomar Pal nominated by the Magistrate, and Bishumbhur and Mohima Chunder Ghatak nominated by the applicant for revision, and instructed them to submit their award by the [redacted]th November.

"The time for the submission of the award was extended by successive order of the 28th November, the 10th December, the 21st December, the 4th January, the 18th January, the 22nd February, the 27th February, the 8th March, the 15th March, the 10th and 29th April, but to no purpose. No award could be secured, and on the 11th May the Magistrate called on the parties to move for a fresh jury. Eventually, on the 20th May, the Magistrate appointed a fresh jury consisting of the Sub-Inspector of the Backergunge police station foreman, Mani Chunder Ganguli and Raj Kumar De nominated by the Magistrate and Jagat Chunder Dass and Kali Nath Dutto nominated by the applicant for revision. The 2nd June was appointed for the submission of their award and an extension to the 11th June was accorded on the 2nd.

"On the 11th or the following day was received a document bearing the signatures of the Sub-Inspector of the Backergunge police station Prasunna Mukherjee, Mani Chunder Ganguli and

Raj Kumar De. It states that the jurymen nominated by the applicant for revision had taken no part in the award; that Jagat Dass had not assisted at any deliberation of the jury, and that Kali Nath Dutto had at first attended, but subsequently absented himself. The nominees of the applicant for revision have therefore submitted no award at all.

"The other three jurymen reported that there was a path used by the public along the line indicated by the petitioner over the property of the applicant for revision, that the bridge over the trench separating what had been Shumbhu Mushrif's homestead, but was at the date of the report a plantation of the petitioner's, and the homestead of the applicant for revision, was a great convenience, and that its existence prejudiced nobody. The Magistrate on the 12th June accepted the report as the award of the majority of the jury, and held that the "char" was a public way, the bank of the ditch across which it was thrown being used in common by inhabitants of the village who crossed by the "char." "*The rest of the alleged path is a mere private matter of complainant's.* I therefore order," he added, "that defendant shall within ten days replace the "char" and I make no further order. This order is under s. 139. Issue notice under s. 140." Accordingly the applicant for revision was notified of the order and instructed to reconstruct the bridge over the trench in ten days. The notice bore date the 16th June, and against it the applicant for revision now moves. The notice expresses that the order of the 14th November had directed the reconstruction of the bridge. In fact that order does not allude to the bridge, but merely instructs the applicant for revision to remove all obstructions to the use of the path or road and restore it to its pristine condition. Again, the final notice requires merely the replacement of the bridge and not the re-opening of the obstructed path leading to the bridge.

"Of what use is the bridge if blocked completely at one end? The applicant for revision blocked the path leading to the bridge, and the bridge being thereby rendered useless dismantled it. Now he has been enjoined to replace the bridge, but "the rest of the *alleged* path is a mere private matter of complainant's." The Magistrate talks of the "alleged path," but I take it that there

1886

DURGA CHARAN DAS v. SASHI BHUSAN GUHO.

was a path which the applicant for revision has closed. Else there would have been no bridge. I do not, however, understand the remainder of the passage last quoted. "The rest of the alleged path," says the Magistrate, "is a mere private matter of complainant's." What is "the rest of the alleged path?" The whole of the path or road save the few cubits spanned by the bridge? And what is the meaning of the phrase "a mere private matter of complainant's?" Does it denote the Magistrate's conviction that as regards the rest of the path claimed the petitioner Durga Charan Das may have an easement or right of way, but there is no public right of way? It seems susceptible of no other meaning, and yet the signification I have attached to it stultifies the final order which is limited to the reconstruction of the bridge. As I have already remarked, what is the use of a bridge blocked completely at one end? Yet the Magistrate has not enjoined the removal of the block or obstruction, to wit the fence or hedge. The applicant for revision has been required merely to reconstruct the bridge on its original site and make it "purbabot" or as it was before.

"Before proceedings under s. 133 of the Criminal Procedure Code can be legally instituted it is the Magistrate's duty to find upon evidence that the path or road in question is or may be lawfully used by the public. It must be a way to which the public are entitled as of right, not a way over a piece of waste land the use of which has been suffered by the owner or tenant of the land. A permissive way may be obstructed at pleasure by the owner or tenant of the land over which it runs. In this instance the Magistrate did not find that the way was public before appointing the jury. The publicity of the way was not a question for the jury, and moreover the Magistrate is clearly of opinion that a part at least of the subject of the dispute does not concern the public. Ergo the appointment of a jury was irregular. *In the matter of the petition of Chunder Nath Sen* (1) and confer *Basaruddin Buiah* v. *Bahara Ali* (2) and *Askar Mea* v. *Sabdar Mea* (3) and *Lal Miah* v. *Nazir Khalashi* (4).

(1) I. L. R., 5 Calc., 875; 6 C. L. R., 379.

(2) I. L. R., 11 Calc., 8.

(3) I. L. R., 12 Calc., 137. (4) I. L. R., 12 Calc., 696.

" Again it cannot be said that the verdict of three jurymen out f five, two of whom did not express any opinion, and one of whom bstained altogether from the enquiry, is the verdict or award f the majority of the jury. One of the jury having declined o act the only course legitimately open to the Magistrate was to ppoint a fresh jury—*Uma Churn Mundle* v. *Joshein Sheikh* (1), r proceed under s. 141 of the Criminal Procedure Code.

" Finally, there is the order absolute, which does not consist with the original notice under s. 133 of the Criminal Procedure Code, and which as it stands cannot be other than infructuous. A literal compliance therewith will leave the path or road obstructed as before, and nothing but literal compliance therewith can be enforced under s. 188 of the Indian Penal Code. I think the whole proceedings should be set aside, and the Magistrate directed to proceed afresh according to law."

No one appeared on the reference

The judgment of the High Court, (PRINSEP and BEVERLEY, JJ.) was as follows :—

The majority of the jury contemplated by s. 139 of the Code of Criminal Procedure is, in our opinion, a majority of the jurors appointed, arrived at after due deliberation amongst themselves. In the present case the majority consists of the only jurors who took the trouble to attend the meetings held. The report so submitted cannot therefore be regarded as a finding of the majority of the jurors under s. 139 on which the Magistrate can act. But at the same time the Magistrate is competent to act under s. 141 and pass such orders as he may think fit. And as matters now stand, we think that we may take the order before us as one so passed on the further materials supplied by the parties.

We find no valid objection to the order regarding the " char " or bamboo bridge over the ditch. The petitioner has been found to have removed it, and its removal is an obstruction to the passage hitherto enjoyed. We accordingly decline to interfere.

P. O'K.

(1) I. L. R., 11 Calc., 84.